

APPLICANTS:
Roy Brockmeyer, Glenn Brockmeyer, Susan Dieter

REQUEST: A variance pursuant to
Section 267-20D of the Harford County Code
to allow the removal and replacement of a
non-conforming building

HEARING DATE: November 17, 2004

BEFORE THE
ZONING HEARING EXAMINER
FOR HARFORD COUNTY
BOARD OF APPEALS
Case No. 5452

ZONING HEARING EXAMINER'S DECISION

APPLICANTS: Roy Brockmeyer, Glenn Brockmeyer & Susan Dieter

LOCATION: 2220-A Jay Cee Drive, Joppa
Tax Map: 65 / Grid: 1B / Parcel: 416 / Lot: 6
First Election District (1st)

ZONING: AG / Agricultural

REQUEST: A variance pursuant to Section 267-20D of the Harford County Code, to
allow the removal and replacement of a non-conforming building in the
Agricultural District.

TESTIMONY AND EVIDENCE OF RECORD:

First testified Roy Brockmeyer, Co-Applicant. Mr. Brockmeyer stated that he was a co-owner of 2220-A Jay Cee Drive, the subject property. He resides next door at 2216-A Jay Cee Drive.

Mr. Brockmeyer described the property as consisting of approximately 2.26 acres, and presently improved by two warehouses, the first being a 30 foot by 90 foot building which is the subject of this application; the second a 44 foot by 60 foot building. The 30 foot by 90 foot building is a two-story structure used since approximately 1952 for warehousing purposes related to Mr. Brockmeyer's carpet business. The 44 foot by 60 foot is a newer building built in 1990.

The total property is surrounded by other residentially used properties, all of which are occupied by various members of the Applicants' extended family.

Mr. Brockmeyer said that the 44 foot by 60 foot warehouse, built in 1990, is subject to a permit issued in that year. The building which is the subject of this request, being the older warehouse, was also subject to a hearing in 1966 which as a result allowed an extension to be constructed to the warehouse.

Case No. 5452 – Roy Brockmeyer, Glenn Brockmeyer & Susan Dieter

Mr. Brockmeyer proposes to replace the “old” warehouse with a 40 foot by 60 foot building. Since the 40 foot by 60 foot warehouse will only be one story, and of smaller dimensions, the replacement would actually be smaller than the existing warehouse. The new building would be constructed approximately in the same footprint as the old. Mr. Brockmeyer stated that the old building was inefficient and dilapidated and needed to be replaced. The replacement building will continue to be used as storage for Mr. Brockmeyer’s carpet business. It will be of a pole barn type construction, with a metal exterior, shingle roof, similar in color to the 44 foot by 60 foot warehouse which will remain.

Mr. Brockmeyer stated that traffic to the site should not increase because of the new warehouse. The public does not come on-site; the warehouse is used only for storage of supplies, which are moved by Mr. Brockmeyer and his employees.

The Applicant’s justification is, perhaps, expressed most clearly in the application, which states, “We want to upgrade and build a modernized building for practicality and safety. This will also improve the appearance of the land for our neighbors and us.”

Next for the Department of Planning and Zoning testified Anthony McClune. Mr. McClune indicated the subject property is unique. The Applicants actually wish to reduce the non-conforming square footage, but cannot do so without a variance.

The existing building is in need of major repairs; however, because of the topography of the site, the building is difficult to repair. The only practical solution is to demolish and rebuild, as proposed.

Mr. McClune stated that he did not believe the building could practically be renovated or replaced because of its very poor condition, and because of the slope and grade of the site on which the building is located. Mr. McClune directed the Hearing Examiner’s attention to photographs in the file, marked as Attachment 9, which show photographs of the rear of the building and the topographical features of the site. In Mr. McClune’s opinion, these factors, together with the dilapidated condition of the building, make the property unique.

No evidence or testimony was offered in opposition to the request.

APPLICABLE LAW:

Section 267-20A provides:

“Nonconforming buildings, structures or uses may be continued, subject to the following provisions:

A. No nonconforming use shall be changed to a use not permitted by this Part 1 in

Case No. 5452 – Roy Brockmeyer, Glenn Brockmeyer & Susan Dieter

the particular district in which the building or structure is located, except:

- (1) If no structural alterations are made, a nonconforming use of a building may be changed to a similar or more-restricted use of the same or lesser intensity.*
- (2) Whenever a nonconforming use has been changed to a more-restricted use, such use shall not thereafter revert to a less-restricted use.*
- (3) When authorized by the Board, one nonconforming use may be substituted for another nonconforming use”*

Section 267-20D provides:

“D. Any nonconforming building or structure which is damaged by less than fifty percent (50%) of its replacement value may be reconstructed to its former dimensions on the same lot and with the same nonconforming use. Nothing in these regulations shall prevent the strengthening or restoring to a safe condition of any building or structure declared to be unsafe.”

Section 267-11 of the Harford County Code allows the granting of a variance to the requirements of the Code:

“Variances.

- A. Except as provided in Section 267-41.1.H., variances from the provisions or requirements of this Part 1 may be granted if the Board finds that:*
 - (1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Part 1 would result in practical difficulty or unreasonable hardship.*
 - (2) The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.*
- B. In authorizing a variance, the Board may impose such conditions regarding the location, character and other features of the proposed*

Case No. 5452 – Roy Brockmeyer, Glenn Brockmeyer & Susan Dieter

structure or use as it may deem necessary, consistent with the purposes of the Part 1 and the laws of the state applicable thereto. No variance shall exceed the minimum adjustment necessary to relieve the hardship imposed by literal enforcement of this Part 1. The Board may require such guaranty or bond as it may deem necessary to insure compliance with conditions imposed.

- C. *If an application for a variance is denied, the Board shall take no further action on another application for substantially the same relief until after two (2) years from the date of such disapproval.”*

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The subject property is a 2.26 acre parcel, zoned agricultural, located within a 6-lot subdivision, all of which is zoned Agricultural (see Attachment 10 of the Staff Report). There are scattered commercial uses within the general area, primarily south of Route 95. The subject property itself is improved by a 30 foot by 90 foot, two-story warehouse building which is, according to the Applicant, in bad shape. The property is also improved by a 44 foot by 60 foot warehouse building built in approximately 1990. According to the application, the property is also improved by a 12 foot by 18 foot Black Bear shed, and 2 garages – all of which are also used for warehousing.

The Applicants, at least initially, appear in a somewhat sympathetic light. They have an old, dilapidated, non-conforming use building, which they wish to tear down and replace with a newer building on a smaller footprint, and having reduced interior storage area. The replacement of the building would remove an eyesore. The implication is that the reduced interior square footage would generate less of an impact on the community.

The proposed replacement would appear to be initially barred by Section 267-20D, which only allows the reconstruction of a non-conforming use in the event the non-conforming building or structure is “damaged by less than fifty percent (50%) of its replacement value”. The Applicants do not suggest that there has been damage to the building of less than 50% of its replacement value. Accordingly, they are requesting a variance to allow the replacement of a non-conforming building. In support, the Applicants suggest that it would be difficult to renovate the building in its present location because of unusual topographic conditions.

A review of the zoning history of the property, however, leads to a conclusion that the circumstances of the Applicants are not as compelling as suggested. The warehouse subject to this application was first used for carpet storage and warehousing in 1952. At that time this building was 30 feet by 58 feet in dimension and two-stories in height (see February 17, 1966 decision of the Board of Appeals). The Applicant in that case, Charles L. Brockmeyer, requested and received a permit to add a 30 foot by 30 foot addition to the existing 30 foot by 58 foot

Case No. 5452 – Roy Brockmeyer, Glenn Brockmeyer & Susan Dieter

building. The decision stated that “the proposed addition would be 30 feet wide by 30 feet long and would just occupy one story; the other story would be used for a children’s play room.” The Board of Appeals granted the request as an extension of a non-conforming use. The Board granted the approval since the extension was within the 35% expansion provided for in Section 20.462 of the *1957 Zoning Ordinance*. Accordingly, it can be seen that the existing 30 foot by 90 foot non-conforming use warehouse was originally a 30 foot by 58 foot non-conforming warehouse, to which a one-story 30 foot by 30 foot addition was allowed in 1966. The addition was determined to be within the 35% expansion allowed by the Zoning Ordinance then in effect.¹

By decision dated September 17, 1990 in Board of Appeals Case No. 4072, the Applicant Brockmeyer Construction was granted permission to “enlarge a non-conforming use, pursuant to Section 267-21B of the Harford County Code”. According to that decision, the Applicant proposed “to build a single-story addition that will allow him (sic) to store additional carpet...” The enlargement was to be less than 50% of the size of the existing building. The Board of Appeals granted approval.

It can accordingly be seen that the non-conforming use which originally utilized a 30 foot by 58 foot building, beginning in 1952, has now become a use which consists of a 30 foot by 90 foot building (30 foot by 58 foot original building plus a 30 foot by 30 foot addition in 1966) plus a 44 foot by 60 foot building allowed as a “enlargement of a non-conforming use” in 1990 plus, according to the application, one 12 foot by 18 foot Black Bear shed and two garages, all of which are used for warehousing.

The above findings and discussion are important in light of the principles underlining the creation and continued existence of non-conforming uses.

While a non-conforming use is a vested right, “...the earnest aim and ultimate purpose of zoning was and is to reduce non-conformance to conformance as speedily as possible with due regard to the legitimate interests of all concerned.” See County Commissioners of Carroll County v. Uhler, 78 Md. App. 140, quoting from Grant v. Mayor & City Council of Baltimore, 212 Md. 301 (1957). Further, the basic premise underlining zoning regulations “. . . is to restrict rather than expand non-conforming uses . . .” See Wilson v. Mayor & Commissioners of Town of Elkton, 35 Md. App. 417 (1977).

It can therefore be seen that while a legitimately established and utilized non-conforming use or structure can exist indefinitely, it cannot expand except by permission of the legislature. If permission is granted it must be done in such a way that it conforms to the pertinent statute.

¹ There was no mention made in the hearing in the present case that any part of the warehouse is or was used as a children’s play room, or as anything other than warehouse space.

Case No. 5452 – Roy Brockmeyer, Glenn Brockmeyer & Susan Dieter

The non-conforming structure of the Applicants has already been enlarged on at least two different occasions. The first occasion was in 1966 by what appeared to be at least a 35% expansion. In 1990 it again expanded by what appears to be a 50% expansion of both the original use and of the 35% expansion granted in 1966.² The non-conforming use has not, over the years, diminished; it has, in fact, greatly expanded. While the Applicants have the vested right to continue to utilize the non-conforming use as long as it is done in compliance with applicable statutes, those statutes must be conformed to when requesting an expansion. To overlook these requirements, or to grant a variance without proper justification, would defeat a purpose of the Harford County Zoning Regulations and would contradict the purpose of the non-conforming use section of those regulations which strictly control the expansion of such uses or structures.

The Applicants wish to demolish a 1952 non-conforming use structure (expanded in 1966) and rebuild a somewhat smaller building. They cannot do so by right. They can do so only if they are granted a variance. To obtain a variance, the Applicants must show there is some uniqueness of the property or topographical condition which results in practical difficulty or unreasonable hardship.

The Applicants, as they must, therefore suggest that the uniqueness of the property and topographical conditions, prevent their compliance with the statute, and therefore seek a variance. Unfortunately, such an argument is not supported by the facts of this case.

The applicable statute (Section 267-20(D)) prohibits the reconstruction of a non-conforming building unless “damaged by less than 50% of its replacement value”³ No testimony or evidence presented had any bearing whatsoever on this standard. No testimony was presented as to replacement value. No testimony or evidence was presented that the building was “damaged” by less than 50% of the replacement value. The topography of the property, even if that topography would create practical difficulties in the repair of the facility (which was not shown with any degree of persuasiveness), does not contribute to the inability of the Applicants to comply with the standard of Section 267-20(D), nor has any other unique circumstance been identified.

² The Black Bear structure and the garage are also used for warehousing purposes. Their legality for such a purpose is not established by either testimony or by any document in the file. Nevertheless, that issue will have no bearing on this decision.

³ The statute specifically allows, without a variance, “The strengthening or restoring to a safe condition . . . any building or structure declared to be unsafe.”

Case No. 5452 – Roy Brockmeyer, Glenn Brockmeyer & Susan Dieter

here is nothing in the Harford County Development Regulations which prohibits the maintenance and repair of non-conforming uses. Furthermore, the difficulty or expense of renovating or repairing an existing structure is not a unique feature of the property or topographic conditions. In a sense, any non-conforming property in Harford County is by definition unique. While the Applicants have the right to continue to use a validly obtained non-conforming use, the purpose of zoning is to eventually phase out non-conforming uses, not to encourage them. See County Commissioners v. Uhler, 78 Md. App. 140 (1989).

Cromwell v. Ward, 102 Md. App. 691 (1995), clearly lays out the kind of showing which must be made in order to demonstrate a unique feature of the property sufficient to allow one to proceed with a variance request.

“In the zoning context, the ‘unique’ aspect of a variance requirement does not refer to the extent of improvements upon the property, or upon neighboring property. ‘Uniqueness’ of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. In respect to structures, it would relate to such characteristics as unusual architectural aspects and bearing or party walls.” North v. St. Mary’s County, 99 Md. App. 512.

The Applicants fail to make any of these required showings. Furthermore, even if they were able to show uniqueness of the property, there must be some resulting practical difficulty or unreasonable hardship. Any difficulty or hardship the Applicants suffer is either due to their failure to properly maintain the property over the years, or their need to comply with the fairly strict requirements of the Harford County non-conforming use statutes. Such reasons are not sufficient to justify the granting of a variance.

CONCLUSION:

For the above reasons, it is recommended the requested variance be denied.

Date: December 30, 2004

ROBERT F. KAHOE, JR.
Zoning Hearing Examiner